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MISSOULA, MT
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PATRICK E. DUFFY
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DANIEL WARREN FINLEY,)	CV 03-97-M-DWM
)	
Petitioner,)	
)	
vs.)	ORDER
)	
MIKE MAHONEY,)	
)	
Respondent.)	
_____)	

United States Magistrate Judge Leif B. Erickson entered Findings and Recommendation (dkt #12) in this matter on May 12, 2005. Petitioner did not timely object and so has waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427

(9th Cir. 2000).

I. Background

Petitioner is *pro se* proceeding pursuant to 28 U.S.C. § 2254. On September 10, 2003, Judge Erickson issued an Order finding that Petitioner had procedurally defaulted on his claim in state court. After giving Petitioner information and instructions regarding procedurally defaulted claims, Judge Erickson required Petitioner to file a brief showing cause and prejudice, or in the alternative, a fundamental miscarriage of justice excusing the procedural default of his claim.

Petitioner's brief was initially due to be filed on or before June 24, 2004. Instead, on June 24, 2004, Petitioner filed a motion for an extension of time to file his brief. Judge Erickson granted Petitioner's motion and set a new deadline of August 24, 2004 for Petitioner to file his cause and prejudice brief. On August 23, 2004, Petitioner filed a Motion for Assignment of Counsel. At that time Petitioner had not yet filed his brief attempting to demonstrate cause and prejudice.

On September 2, 2004, Judge Erickson issued an Order denying Petitioner's Motion for Assignment of Counsel. In the Order Judge Erickson expressed concerns regarding the possibility that the timing of Petitioner's motion was a delay tactic, and regarding whether it could even consider the merits of Petitioner's claims given his procedural default in state court. Judge Erickson gave Petitioner until September 30, 2004, to file

his cause and prejudice brief. This Order was addressed to Petitioner at the address listed on his Motion for Assignment of Counsel. The postal service returned the Order to the Court. The envelope was marked "return to sender" because the addressee had "moved." Petitioner has not filed a response to the Court's September 2, 2004 Order.

The Montana Department of Corrections website indicates that as of December 31, 2004, Mr. Finley's sentence expired.

II. Analysis

The trial court has discretion under Fed. R. Civ. P. 41(b) in dismissing an action for failure to comply with a court order. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975). However, a court must consider the following factors before imposing a dismissal as a sanction for failure to prosecute or failure to comply with a court order: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)); see also *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996); *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (per curiam), cert. denied, 479 U.S. 829 (1986).

Petitioner's failure to cooperate and resolve this case supports dismissal. "The public's interest in expeditious resolution of litigation always favors dismissal." *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Given Petitioner's failure to respond to Court orders and failure to update the Court with his current address, this factor weighs in favor of dismissal.

Docket management favors dismissal. "The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest." *Pagtalunan*, 291 F.3d 639 (citing *Yourish*, 191 F.3d 983). Judge Erickson provided Petitioner with numerous opportunities to file a brief showing cause and prejudice, or in the alternative, a fundamental miscarriage of justice excusing the procedural default of his claim. Petitioner has failed to do so. The Court must be able to manage its docket. Therefore, this factor favors dismissal.

"To prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case." *Malone v. United States Postal Service*, 833 F.2d 128, 131 (9th Cir. 1987). The Respondent has not yet been served in this case and thus there is no immediate prejudice to Respondent. However, given Petitioner's refusal to comply with Judge Erickson's orders and failure to provide an updated address, the

matter could linger indefinitely and prejudice Respondent.

The fourth element mandates that courts should consider the possibility of and provide less drastic alternatives.

Alternatives may include "allowing further amended complaints, allowing additional time, or insisting that appellant associate experienced counsel." *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981). Although the court should consider less drastic alternatives to a dismissal, the court is not required to exhaust all such alternatives prior to dismissal. *Id.* Judge Erickson granted Petitioner an extension of time to file his cause and prejudice brief, and after denying his Motion for Assignment of Counsel gave him an additional twenty-eight days to file his brief. In his Order requiring Petitioner to show cause and prejudice and in his Order granting Petitioner's Motion for an Extension of Time, Judge Erickson warned Petitioner that his failure to file written documentation as ordered could result in a recommendation of denial of his claims.

Judge Erickson also warned Petitioner that failure to keep the court advised of any change of address could result in a recommendation of denial of his claims. The Court has the authority to dismiss a claim when a party fails to notify the Court of a change of address. Rule 5.5 of the Local Rules of Procedure for the United States District Court for the District of Montana states:

(a) Duty to Notify. An attorney or a party

proceeding *pro se* whose address changes while an action is pending must promptly file with the Court and serve upon all opposing parties a Notice of Change of Address specifying the new address.

(b) Dismissal Due to Failure to Notify. The Court may dismiss a complaint without prejudice or strike an answer when:

- 1) mail directed to the attorney or *pro se* party by the Court has been returned to the Court as not deliverable; and

- 2) the Court fails to receive within 60 days of this return a written communication from the attorney or *pro se* party indicating a current address.

The September 2, 2004 Order was returned to the Court as undeliverable on September 9, 2004 and more than 60 days have passed without any notice to the Court from Petitioner of his current address. Moreover, Judge Erickson's Finding and Recommendations were returned by the postal service to the clerk's office on May 9, 2005 (dkt #13).

Although the Court could grant Petitioner additional time to respond, this alternative appears futile given Petitioner's failure to keep the Court apprised of his current address. Petitioner could have objected to the Findings and Recommendations, which may not technically be considered an "alternative" but it provided Petitioner the chance to challenge this Court's rulings.

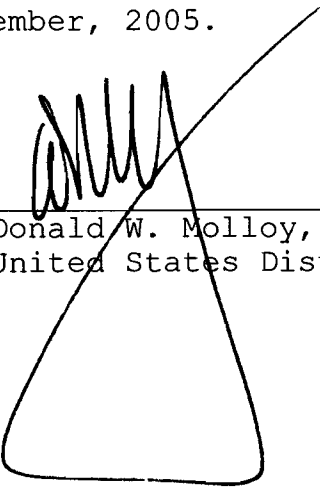
The last factor weighs against denial of the petition because public policy favors the disposition of cases on their merits. *Pagtalunan*, 291 F.3d 639 (citing *Hernandez v.*

City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998)).

However, cumulatively the Court finds that the other four factors weigh in favor of dismissing the Petition filed pursuant to 28 U.S.C. § 2254 and therefore dismissal is an appropriate sanction in this matter.

Based on the foregoing, IT IS HEREBY ORDERED that Judge Erickson's Findings and Recommendation are adopted in full and Petitioner's Petition (dkt #1) is DENIED without prejudice.

DATED this 28 day of December, 2005.



Donald W. Molloy, Chief Judge
United States District Court